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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 KEVIN MUNRO, et al.,

11 Plaintiffs,

12 v.

13 KING BROADCASTING
14 COMPANY,

15 Defendant.

CASE NO. C13-1308JLR

ORDER DENYING MOTION
FOR JUDGMENT ON THE
PLEADINGS

16 Before the court is Defendant King Broadcasting Company's ("King") Motion for
17 Judgment on the Pleadings in this class action lawsuit brought under the Telephone
18 Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. (Mot. (Dkt. # 13).) King asks the
19 court to dismiss this case in its entirety, claiming that Plaintiffs' Complaint requests relief
20 that is unavailable under the TCPA. (Mot.) The motion is overly aggressive, not well
21 grounded in law, and DENIED. In addition, the court rules on two pending discovery
22 motions and awards limited sanctions.

I. BACKGROUND

This is a case about unwanted text messages. Several years ago, Plaintiff Kevin Munro signed up to receive daily text messages about the weather from local news station “King 5.” (Compl. (Dkt. # 1-1) ¶ 3.2.) Each morning, King 5 would send Mr. Munro a text message providing the weather report for the upcoming day. (*Id.*) After receiving these text messages every morning for about a month, Mr. Munro decided he no longer wanted to receive them and attempted to opt out. (*Id.*) Each message included instructions to “Reply STOP to opt out.” (*Id.* ¶ 3.3.) Mr. Munro replied “STOP” to one of the text messages, but the messages kept coming. (*Id.*) Mr. Munro attempted this same action approximately ten times over the course of the next few months, but the text messages still kept coming. (*Id.*) Mr. Munro called King 5 in a further attempt to opt out. (*Id.* ¶¶ 3.3-3.4.) He was transferred to voicemail, so he left a message describing the problem and asking that the texts stop. (*Id.*) The text messages did not stop, so Mr. Munro continued to reply “STOP” to the text messages, repeating his reply of “STOP” between 30 and 50 times over the course of several months. (*Id.* ¶ 3.4.) The text messages still did not stop, and Mr. Munro alleges that they continue to this day. (*Id.*)

Mr. Munro eventually filed this lawsuit in King County Superior Court, claiming that King’s actions violated the TCPA. (*See generally* Compl.) Defendant removed the case to federal court and answered the Complaint. (Not. of Removal (Dkt. # 1); Ans. (Dkt. # 6).) On October 17, 2013, King’s counsel withdrew and its present counsel appeared, immediately filing this motion for judgment on the pleadings. (*See* 10/17/13 Order (Dkt. # 12); Mot.)

II. ANALYSIS

A. Legal Standard on a Motion for Judgment on the Pleadings

Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings after the pleadings are closed. A court “must accept all factual allegations in the complaint as true and construe them in the light most favorable to the non-moving party.” *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009) (citation omitted); see *Yakima Valley Mem’l Hosp. v. Wash. State Dept. of Health*, 654 F.3d 919, 925 (9th Cir. 2011) (court “assume[s] the facts alleged in the complaint are true”). “Judgment on the pleadings is properly granted when there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law.” *Id.*; see *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011).

When a Rule 12(c) motion is used as a vehicle for a Rule 12(b)(6) motion after an answer has been filed, or when it is functionally equivalent to a motion to dismiss for failure to state a claim, the same standard applies to both. *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989); see *Seabright Ins. Co. v. Matson Terminals, Inc.*, 828 F. Supp. 2d 1177 (D. Haw. 2011) (motions differ in time of filing but are otherwise functionally identical and require same standard of review). Dismissal for failure to state a claim “is proper if there is a ‘lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.’” *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988)).

1 **B. Discussion**

2 King's motion for judgment on the pleadings argues that Mr. Munro is not allowed
3 to sue under the TCPA. (Mot. at 3-4.) King argues that, because Mr. Munro gave his
4 consent to receive the text messages, he has forever waived his right to recover damages
5 under the TCPA. (*Id.*) King argues that the TCPA does not provide a remedy for
6 telephone users who provide express consent to receive messages but later revoke that
7 consent, even if the messages continue after consent is revoked. (*Id.*) King insists that
8 for the court to take any contrary position would be a "re-writing of the statute" that is
9 "exclusively Congress's province." (*Id.* at 4.) For the reasons described below, the court
10 disagrees.

11 Under the TCPA, it is unlawful to send unsolicited text messages to a person's
12 cellular telephone. *See* 47 U.S.C. § 227. The TCPA is designed to protect individual
13 consumers from receiving intrusive and unwanted telephone calls. *Mims v. Arrow Fin.*
14 *Servs., LLC*, --- U.S. ----, 132 S. Ct. 740, 745 (2012). The TCPA makes it "unlawful for
15 any person within the United States . . . to make a call (other than a call made for
16 emergency purposes or made with the prior express consent of the called party) using any
17 automatic dialing system . . . to any telephone number assigned to a . . . cellular telephone
18 service . . . for which the called party is charged for the call." 47 U.S.C. § 227(b)(1)(A).
19 The Federal Communications Commission ("FCC"), the agency charged with
20 implementing the TCPA, has ruled that the TCPA applies not only to voice calls but also
21 to text messages, including those sent using short message service (SMS). *See Rules and*
22 *Regulations Implementing Telephone Consumer Protection Act of 1991*, CG Dkt. No. 02-

1 278, Report and Order, 18 FCC Red. 14014, 14115, ¶ 165 (2003). The TCPA creates a
2 private right of action for persons affected by violations of its provisions and authorizes
3 an award of \$500.00 in statutory damages for each violation and the possibility of treble
4 damages. 47 U.S.C. § 227(b)(3).

5 As King points out, the TCPA is silent on whether a consumer may revoke
6 previously-granted consent to receive text messages. (Mot. at 4.) It is clear under
7 the statute that damages cannot be awarded if the caller has the “prior express
8 consent of the called party.” *See* 47 U.S.C. § 227(b)(1)(A). But the TCPA says nothing
9 about whether, if the called party revokes consent, it is lawful for the caller to ignore that
10 revocation and continue to call as if the consent never even occurred. *See* 47 U.S.C.
11 § 227(b).

12 Nevertheless, the weight of authority suggests that consent may be revoked under
13 the TCPA and that if messages continue after consent is revoked, those messages violate
14 the TCPA. *See, e.g., Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 268-272 (3d Cir.
15 2013); *Beal v. Wyndham Vacation Resorts, Inc.*, --- F. Supp. ----, 2013 WL 3870282, at
16 *16 (W.D. Wis. June 20, 2013); *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d
17 744, 749 (W.D. Tex. 2011); *Moore v. Firstsource Advantage, LLC*, No. 07-CV-770, 2011
18 WL 4345703, at *11-12 (W.D.N.Y. Sept. 15, 2011); *Brook v. Suncoast Schs., FCU*, No.
19 8:12-cv-01428-T-33MAP, 2012 WL 6059199, at *4 (M.D. Fla. Dec. 6, 2012);
20 *Sengenberger v. Credit Control Servs., Inc.*, No. 09 C 2796, 2010 WL 1791270, at *4
21 (N.D. Ill. May 5, 2010). Although the Ninth Circuit has not addressed this question, at
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1 least one district court in the Ninth Circuit has. *Gutierrez v. Barclays Grp.*, No.
 2 10cv1012 (BGS), 2011 WL 579238, at *4 (S.D. Cal. Feb 9, 2011)

3 The courts that have reached this conclusion have done so for several key reasons.

4 First, the term “consent” must be read to incorporate its common law meaning absent
 5 Congressional indication to the contrary, and at common law consent may be revoked.

6 *See, e.g., Gager*, 727 F.3d at 270-71 (citing *Neder v. United States*, 527 U.S. 1, 21 (1999)

7 (“[W]here Congress uses terms that have accumulated settled meaning under . . . the

8 common law, a court must infer, unless the statute otherwise dictates, that Congress

9 means to incorporate the established meaning of these terms.”)); *see id.* at 271 (citing

10 RESTATEMENT (SECOND) OF TORTS § 892A, cmt. I (1979)). Second, allowing consumers

11 to revoke consent is “in line with the purpose of the TCPA”; the TCPA is a remedial

12 statute passed to protect consumers from unwanted automated telephone calls and

13 messages and should be construed in accordance with that purpose. *Id.* at 271 (citing

14 *Leshner v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 997 (3d Cir. 2011)).

15 Finally, this interpretation hews carefully to the FCC’s decision on this issue in *In the*

16 *Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act*

17 *of 1991, Soundbite Commc’n, Inc.*, 27 FCC Rcd. 15391 (Nov. 26, 2012). In that ruling,

18 the FCC stated that “consumer consent to receive . . . messages is not unlimited,” and that

19 a consumer may “fully revoke” prior consent by transmitting an opt-out request to the

20 sending party. *Id.* at 15397 ¶¶ 8, 11. In *Gager*, the court held that the *Soundbite* decision

21 served as additional authority supporting its conclusion that consent can be revoked under

22

1 the TCPA.¹ *Gager*, 727 F.3d at 271-72. All of these reasons are persuasive, and the
2 court incorporates the analysis in *Gager* and the cases that follow it herein.

3 King asserts that there is a “split of decisions” on whether consent may be
4 revoked. This is an overstatement. King cites only three cases to support its position,
5 and all of them are suspect. First and foremost, King cites dicta in *Saunders v. NCO Fin.*
6 *Sys., Inc.*, 910 F. Supp. 2d 464, 468-69 (E.D.N.Y. 2012). The *Saunders* decision
7 provides only cursory analysis on this question and, notably, relies heavily on the district
8 court decision in *Gager* that was later reversed by the Third Circuit. *See id.* at 468-69;
9 *Gager*, 727 F.3d at 274 (reversing district court). The *Saunders* decision also preceded
10 the FCC’s ruling in *Soundbite*, so the court did not have the benefit of the FCC’s
11 guidance on this topic. *See Saunders*, 910 F. Supp. at 468-69. King’s citation to *Chavez*
12 *v. Advantage Grp.*, --- F. Supp. 2d ----, 2013 WL 4011006, at *3-4 (D. Colo. Aug. 5,
13 2013) suffers from the same problems. The analysis is cursory, does not discuss
14 *Soundbite*, and relies only on *Saunders* and the district court decision in *Gager*, which
15 was reversed two weeks later. *See Chavez*, 2013 WL 4011006, at *3-4. Similarly,
16 King’s citation to *Kenny v. Mercantile Adjustment Bureau, LLC*, No. 10-CV-1010, 2013
17 WL 1855782, at *6-7 (W.D.N.Y. May 1, 2013) is not persuasive. *Kenny* cites *Saunders*,
18 arguably constitutes dicta, and does not address *Soundbite* or any of the arguments relied
19 on in *Gager* and other cases. *Kenny*, 2013 WL 1855782, at *6-7. None of the cases cited
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22 ¹ The court in *Gager* declined to afford *Chevron* deference to the *Soundbite* ruling, and
the court will do so here as well. *See Gager*, 727 F.3d at 271 n.5.

1 by King suggest to the court that the analysis applied in *Gager* and similar cases is wrong
2 or should be ignored.

3 King raises a handful of additional arguments to the contrary, but none of them are
4 new or novel. Other courts have already rejected all of King's arguments, including its
5 arguments comparing the TCPA to other, similar statutes with revocation provisions
6 (Mot. at 6); *Gager*, 727 F.3d at 270; and its argument that statutory silence is equivalent
7 to an affirmative dictate that the consumer be unable to revoke consent (Mot. at 6);
8 *Gager*, 727 F.3d at 270. To the contrary, Mr. Munro's interpretation of the statute does
9 not require the court to re-write the TCPA; instead, it requires only a common-sense
10 application of statutory construction rules that, in any event, the court is bound to follow.
11 The court rejects King's arguments just as other courts have done. *See, e.g., Gager*, 727
12 F.3d at 270.

13 As numerous other courts have held, the TCPA allows consumers to revoke
14 consent to receive text messages and allows them to bring a private action under the
15 TCPA if the messages do not stop thereafter. In light of *Gager* and *Soundbite*, King's
16 motion is DENIED.

17 **C. Discovery Motions**

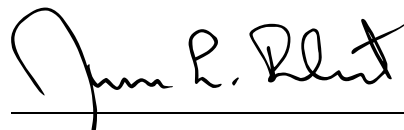
18 Also pending before the court are King's Motion for a Protective Order (Mot. for
19 PO (Dkt. # 20)) and Mr. Munro's Motion to Compel and for Sanctions (Mot. to Compel
20 (Dkt. # 22)). The gist of these two motions is that King asserts it need not respond to Mr.
21 Munro's discovery requests because it has a dispositive motion pending. (*See* Mot. for
22 PO at 2-3; Mot. to Compel at 1-6.) In the Motion for Protective Order, King asks the

1 court to give its blessing to this obstructive conduct by granting a motion to stay pending
2 a ruling on King's motion for judgment on the pleadings. (Mot. for PO at 3-4.) The
3 court DENIES this motion as moot in light of the above ruling. Further, the court finds
4 untenable King's position that it need not respond to discovery, ORDERS King to
5 respond to outstanding discovery requests in a timely fashion, and ORDERS King to pay
6 sanctions to Mr. Munro in an amount sufficient to compensate Mr. Munro for the
7 attorney's fees and costs associated with filing his Motion to Compel. Mr. Munro shall
8 submit an affidavit describing these costs.

9 **III. CONCLUSION**

10 The court DENIES King's motion for judgment on the pleadings (Dkt. # 13),
11 DENIES AS MOOT King's Motion for Protective Order (Dkt. # 20), GRANTS IN
12 PART Mr. Munro's Motion to Compel Discovery (Dkt. # 22) as described, and DENIES
13 the Motion to Compel Discovery in all other respects.

14 Dated this 26th day of November, 2013.

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17 JAMES L. ROBART
18 United States District Judge
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